MOTION FILED SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,
Petitioner,

vs.

JOHN DODGE,
Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF PACIFIC MERCHANT SHIPPING ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

and

BRIEF OF PACIFIC MERCHANT SHIPPING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF PACIFIC MERCHANT SHIPPING ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pacific Merchant Shipping Association respectfully moves this Court for leave to file the accompanying Brief as *amicus curiae* in support of the petition for certiorari

in this case. The consent of the attorney for the petitioner herein has been obtained, but the attorney for respondent Dodge herein has refused to consent to the filing of such a brief.

The applicant has a strong interest in the disposition of this case. Pacific Merchant Shipping Association is a voluntary association of American steamship companies[1] conducting major operations and, in most instances, having their headquarters on the West Coast and within the Ninth Circuit. They are exposed to injury claims of longshoremen and engaged in frequent litigation of such claims in the federal district courts of the Ninth and other maritime circuits and may be considered representative of numerous other American steamship companies also involved in such litigation.

In addition to having a large number of longshoremen's lawsuits pending against its members, Pacific Merchant Shipping Association is, by stipulation, filing a brief *amicus curiae* in support of the petition for a writ of certiorari in the case of *United States Lines, Inc. v. Shellman,* No. ....., October Term, 1975, and had filed a brief as *amicus curiae* in that case in the United States Court of Appeals for the Ninth Circuit, where it was a companion case argued together with this one. Should this Court grant the petition for a writ of certiorari in the *Shellman* case, Pacific Merchant Shipping Association will seek to file a further brief as *amicus curiae* upon the

[1]Alaska Hydro-Train (a division of Crowley Maritime Corporation), American President Lines (including American Mail Line), Matson Navigation Company, Pacific Far East Lines, Inc., Prudential-Grace Lines, Inc., States Steamship Company, and United States Lines, Inc.

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merits. The issues in the *Shellman* case and the case herein are substantially identical. The two cases raise important questions concerning the meaning of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Those Amendments made a number of changes in the Act intended to shift the emphasis sharply back toward the compensation security features of the Act and away from lawsuits, whether between longshoremen and vessel or between vessel and stevedore, and, consistently with that aim, provided dramatic but much needed increases in the compensation benefits payable under the Act. Those benefits are normally insured. As in the past, members of the Association now pay the resulting higher premiums for such insurance, so far as the premiums are attributable to the stevedoring of their own vessels, as a distinct element of the rates which they pay to their stevedore contractors.

The Association and its members are keenly interested in interpretations of the Act which will result in achieving the broad purposes of the 1972 Amendments by providing longshoremen with the ample benefits and long-term security which the Act provides, unburdened by a heavy overlay of attorneys' fees; by shifting the emphasis back where it belongs to the compensation features of the Act; by eliminating numerous costly and confusing problems in the past administration of the Act; and by ensuring that litigation, when it does ensue, will be equitably determined in accordance with the overall aims of the Amendments and current views on the distribution of loss.

While the petitioner in this case has interests in common with the members of this Association, it is but a single steamship company and can speak only for itself from its own experience and point of view. This Association, on the other hand, while by no means comprising all American steamship companies, comprises a major and representative group of them and is therefore able to speak, as it desires to do, from their experience and viewpoint as to the magnitude of the questions raised by the petition, in respect of the large number of cases directly affected, the possible effect of their disposition upon still other cases, the potential for protracted uncertainty and the consequent burden upon not only the parties but the lower courts, and the interest of the industry at large in having the questions involved disposed of on a sound doctrinal basis calculated to reduce future litigation.

Dated, January 30, 1976.

GRAYDON S. STARING,
Attorney for Pacific Merchant Shipping Association as Amicus Curiae.

LILLICK MCHOSE & CHARLES,
Of Counsel.

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BRIEF OF PACIFIC MERCHANT SHIPPING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF PACIFIC MERCHANT SHIPPING ASSOCIATION

Amicus curiae, Pacific Merchant Shipping Association, is a voluntary association of American steamship com-

panies[1] conducting major operations and, in most instances, having their headquarters on the West Coast and within the Ninth Circuit. They are exposed to injury claims of longshoremen and engaged in frequent litigation of such claims in the federal district courts of the Ninth Circuit and other maritime circuits and may be considered representative of numerous other American steamship companies also involved in such litigation.

United States Lines, Inc. v. Shellman, No. ....., October Term, 1975, and *Mitsui Shintaku Ginko K.K., Tokyo v. Dodge and Brady-Hamilton Stevedore Co.*, No. 75-1058, October Term, 1975, raise important questions concerning the meaning of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Those Amendments made a number of changes in the Act intended to shift the emphasis sharply back toward the compensation security features of the Act and away from lawsuits, whether between longshoremen and vessel or between vessel and stevedore, and, consistently with that aim, provided dramatic but much needed increases in the compensation benefits payable under the Act. Those benefits are normally insured. As in the past, members of the Association now pay the resulting higher premiums for such insurance, so far as the premiums are attributable to the stevedoring of their own vessels, as a distinct element of the rates which they pay to their stevedore contractors.

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The Association and its members are keenly interested in interpretations of the Act which will result in achieving the broad purposes of the 1972 Amendments by providing longshoremen with the ample benefits and long-term security which the Act provides, unburdened by a heavy overlay of attorneys' fees; by shifting the emphasis back where it belongs to the compensation features of the Act; by eliminating numerous costly and confusing problems in the past administration of the Act; and by ensuring that litigation, when it does ensue, will be equitably determined in accordance with the overall aims of the Amendments and current views on the distribution of loss.

REASONS FOR GRANTING THE WRIT

We concur with the petitioner that the case presents an important question of federal law which has not been but should be settled by this Court for the reasons stated in the petition, the reiteration of which we would spare the Court here. We would add, however, some figures suggesting the number of cases affected by the disposition of the question. The seven members of this Association had pending against them, as of December 31, 1975, a total of 216 lawsuits for injuries to longshoremen and harbor workers occurring since November 26, 1972, and therefore subject to 33 U.S.C. §905(b), the new subsection effective as of that date which the Court is asked by the petitioner to construe in this case. Most such cases involve the issue of stevedore negligence and the questions raised by petitioner here. It may be assumed that the many other steamship companies operating in United States ports have

similar numbers of such claims pending against them. In all such cases, whatever the Court of Appeals may have said below, it is necessary to litigate such questions until they are finally settled by this Court. The volume of the litigation and the number of parties and suits involved in uncertainty pending final decision by this Court go far, we submit, to establish the importance of the question.

We also concur with petitioner that the decision below is in conflict with the decisions of other Courts of Appeals, in particular the decisions in *Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C. Cir. 1972), *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968) and *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 37 (3rd Cir. 1975). We also concur that the decision is contrary to the implications of this Court's decision in *United States v. Reliable Transfer Co.*, ... U.S. ....., 1975 A.M.C. 541 (1975).

Unfortunately, the Court of Appeals for the Ninth Circuit, while deciding what should be the outcome of this case, contributed almost nothing to the settlement of the question involved for the nation as a whole, despite excellent briefing of all points of view and a combined oral argument of the *Shellman* and *Dodge* cases in which nine counsel were heard and the questions presented by the petition here were strongly urged and ably discussed. The Court of Appeals opinion failed to acknowledge the central question presented by the petition here, which has to do with the interpretation of §905(b): gave that section, upon which the whole case turns, no explicit analysis whatever; and decided the case by an opinion which would

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seem to deal with the case as one arising prior to the enactment of the section.

Because of the importance of the questions presented here in so many cases below and to so many parties, they should be settled definitively and early. But more than that, they should, in our view, be settled on a basis broader than the disposition of a single case or group of cases. The Longshoremen's and Harbor Workers' Compensation Act has given rise to a great many nagging problems in the courts in its fifty-year history, of which the distribution of risks between vessel owner and stevedore employer is only one. The 1972 Amendments to the Act have explicitly dealt with some of these problems. notably by dramatically increasing compensation benefits, by adjusting geographical scope of coverage and by eliminating the warranty of seaworthiness and the recovery of indemnity against an employer.

Other problems not explicitly solved, however, involve whether employer, employee or both may sue the vessel owner as third party in certain circumstances;[2] differences in treatment of longshoremen from the treatment of the majority of the employees covered by the Act,[3] as well as employees covered by the companion Federal Employees' Compensation Act;[4] vagueness about the employer's recoupment of compensation benefits out of the third party damages when suit is brought by the employee

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[2]See *Czaplicki v. Hoegh Silvercloud*, 351 U.S. 525, 1956 A.M.C. 1465 (1956); *Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd.*, 394 U.S. 404, 1969 A.M.C. 745 (1969).

[3]Compare *Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C. Cir. 1972).

[4]Compare *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968).

rather than the employer;[5] uncertainty as to whether the vessel owner has an obligation to protect the employer's interest in such recovery;[6] and disparate treatment of the deduction of attorneys' fees in the allocation of recovery where the employee rather than the employer sues the third party.[7] We believe that all of these questions are related in principle and that the questions raised here should be not only settled early but settled in a manner which does not aggravate other problems but advances their solution by resting decision upon a sound principle with all such problems in mind.

We have advocated such a position in the Court of Appeals. We agree in the main with the position of the petitioner, although not necessarily in all details, and are interested in seeing that the Court is presented with a broader view of the field of litigation relative to the Act involved and with views other than our own and other than those of the District Court in *Shellman*, in the hope that this Court will not only decide this case but do so upon a sound and equitable basis which will dispose of

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[5]See *The Etna*, 138 F.2d 37, 1943 A.M.C. 1126 (3rd Cir. 1943); *Fontana v. Pennsylvania R.R. Co.*, 106 F.Supp. 461, 1952 A.M.C. 1535 (S.D.N.Y. 1952), aff'd, 205 F.2d 151, 1953 A.M.C. 1258 (2d Cir. 1953) and cases there cited.

[6]Compare *International Terminal Operating Co., Inc. v. Waterman Steamship Co.*, 272 F.2d 15, 1960 A.M.C. 306 (2d Cir. 1959) with *Jarka Corp. of New England v. United States Lines Co.*, 387 F.2d 436, 1968 A.M.C. 487 (1st Cir. 1967).

[7]Compare *Chouest v. A&P. Boat Rentals*, 472 F.2d 1026, 1973 A.M.C. 1542 (5th Cir. 1973) and *Scozzari v. Jade Co., Inc.*, 350 F.Supp. 801, 1973 A.M.C. 1886 (E.D.N.Y. 1972) with *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345, 1966 A.M.C. 2024 (5th Cir. 1966); *Russo v. Flota Mercante Grancolombiana*, 303 F.Supp. 1404, 1969 A.M.C. 2096 (S.D.N.Y. 1969) and *Riddick v. Rederi A/B Fredrika*, 271 F.Supp. 360, 1967 A.M.C. 1808 (E.D.Va. 1967).

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other related but dissimilar cases hereafter. To this end, if certiorari is granted, we will seek to file a brief *amicus curiae* upon the merits.

CONCLUSION

For the foregoing reasons, we pray that the petition for a writ of certiorari be granted.

Dated, January 30, 1976.

Respectfully submitted,

GRAYDON S. STARING,

Attorney for Pacific Merchant Shipping Association as Amicus Curiae.

LILLICK MCHOSE & CHARLES,

Of Counsel.